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NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

AUG 28 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	2 CA-CR 2007-0189
Appellee,)	DEPARTMENT B
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
ELLA KATHLEEN McCARTHY,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20063358

Honorable Michael Cruikshank, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt

Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By David J. Euchner

Tucson
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E S P I N O S A, Judge.

¶1 After a jury trial, appellant Ella McCarthy was convicted of possession of a dangerous drug and possession of drug paraphernalia. The trial court placed her on probation for three years. On appeal, she contends the court erred by denying her motion to suppress statements she had made to police officers and evidence found as a result of those statements. For the reasons stated below, we affirm.

Factual and Procedural Background

¶2 On the morning of April 9, 2006, Tucson police officer Dan Roberts was called to a residence to investigate an illegal electricity connection at McCarthy's apartment. When he knocked on her door, McCarthy answered, and Roberts noticed the home was "filthy." Roberts asked permission to come inside to check on the welfare of McCarthy's two young children. She admitted him and another officer and led Roberts to the bedroom where the children were asleep. After he saw the children, Roberts asked if he could look in the refrigerator to make sure there was food for them. McCarthy agreed, and Roberts went to the kitchen area and checked the refrigerator.

¶3 On a table, Roberts noticed a makeup mirror with a credit card, a spoon, and a white substance that he suspected to be methamphetamine. When he asked McCarthy about the substance, she claimed not to "know what it was or whose it was." Roberts said he believed it was methamphetamine and asked if there were any more drugs in the house. McCarthy responded that, if there were, she knew where they would be. Roberts asked if she would show him the drugs, and she led him to the bedroom where the children were asleep.

McCarthy reached into the closet and pulled down a glass tray that held a “baggie” containing a white, crystal substance and a spoon. Roberts and McCarthy then went into the living room where he advised her of her rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). McCarthy agreed to speak with Roberts and admitted buying and using the drugs. She then consented to a search of the bathroom, where Roberts found several bottles of drugs prescribed to persons other than McCarthy. According to Roberts, the entire encounter lasted from ten to fifteen minutes.

¶4 In September 2006, McCarthy was indicted on charges of possessing a dangerous drug and drug paraphernalia. She was convicted and sentenced as outlined above, and this appeal followed.

Discussion

¶5 Before trial, McCarthy filed a motion to suppress statements she made to Roberts and evidence seized from her home the morning she was arrested. After a hearing, the trial court denied the motion. On appeal, McCarthy argues the court erred because her statements were obtained in violation of her rights under *Miranda*. “When reviewing a trial court’s denial of a motion to suppress, we review only the evidence presented at the hearing on the motion to suppress, and we view it in the light most favorable to sustaining the trial court’s ruling.” *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007) (internal citation omitted). We review discretionary matters for an abuse of the trial court’s discretion and review issues of law de novo. *Id.*

¶6 At the suppression hearing, McCarthy’s account of the police questioning differed from Roberts’s account. Although the trial court did not expressly accept one version of the story or the other, in denying the motion, it stated, “A lot of this turns on the credibility of the witnesses.” It is well established that, “[w]hen there is a conflict between the testimony of the appellant and that of police officers, the resolution is for the trial court.” *State v. Tapia*, 159 Ariz. 284, 288, 767 P.2d 5, 9 (1988); accord *State v. Williams*, 27 Ariz. App. 279, 285, 554 P.2d 646, 652 (1976). Roberts’s version of the facts best supports the trial court’s ruling, and we therefore view the testimony in that light. See *State v. Smith*, 197 Ariz. 333, ¶ 2, 4 P.3d 388, 390 (App. 1999).

¶7 McCarthy contends the evidence should have been suppressed because, when she answered Roberts’s questions about the drug residue on the mirror in the kitchen and directed him to the drugs in the bedroom, she was in custody and had not yet been informed of her rights pursuant to *Miranda*. She argues that, because two armed, uniformed police officers questioned her in her home while she was clearly a suspect in investigations of electricity theft, child neglect, and possession of drug paraphernalia, and because her children were asleep in a bedroom, she could not reasonably have believed she was free to leave.

¶8 As McCarthy correctly points out, the test for determining whether a person is in police custody for purposes of *Miranda* is whether, under the totality of the circumstances, a reasonable person would believe that he or she was under arrest or otherwise significantly deprived of freedom of movement. See *Smith*, 197 Ariz. 333, ¶ 4,

4 P.3d at 390. Relevant factors in determining whether a person is in custody include: the presence of objective indicia of arrest, the interrogation site, the length and form of the investigation, and whether the focus of the investigation is on the accused. *Id.* ¶ 5.

¶9 We cannot say the trial court abused its discretion in finding McCarthy was not in custody when she spoke with Roberts in her apartment. She was not arrested or handcuffed, and the officers never drew a weapon or restricted her movement by physical force or verbal direction. *See State v. Cruz-Mata*, 138 Ariz. 370, 373, 674 P.2d 1368, 1371 (1983) (objective indicia of arrest include whether officers had handcuffed defendant or drawn a weapon). The entire encounter lasted no more than fifteen minutes and took place entirely within McCarthy’s home. *See State v. Thompson*, 146 Ariz. 552, 556, 707 P.2d 956, 960 (App. 1985) (generally, no custodial interrogation when person questioned at home).

¶10 We note, and the state concedes, that the fourth factor of the custody analysis—whether “the focus of the investigation [is] on the accused”—weighs in favor of finding that McCarthy was in custody. *See Smith*, 197 Ariz. 333, ¶ 5, 4 P.3d at 390. Indeed, she was the only adult in the home and was the subject of investigation for electricity theft, suspected child neglect, and drug possession. But this factor alone does not necessarily make the encounter custodial. *See State v. Kennedy*, 116 Ariz. 566, 569, 570 P.2d 508, 511 (App. 1977) (probable cause to suspect a criminal offense does not automatically necessitate *Miranda* warnings). Custodial interrogation for the purposes of *Miranda* is determined by the totality of the circumstances. *Smith*, 197 Ariz. 333, ¶ 4, 4 P.3d at 390. There was

evidence here from which the trial court could have found this was a brief encounter during which the police made no shows of force, engaged in no coercive conduct, sought express permission to move from room to room, and received McCarthy's consent at each stage of the encounter. *See id.* ¶ 5 (finding defendant not in custody for *Miranda* purposes when only fourth factor present).

¶11 McCarthy also maintains no reasonable person in her position would have felt free to leave because her children were asleep in the next room. But we are unwilling to say, as a matter of law, that the presence of her children in the home rendered McCarthy's cooperation with the officers a custodial interrogation. McCarthy could have denied the officers entry, asked them to leave, or otherwise attempted to end the interview; failing that, she could have left the premises with the children. Instead, she made no effort to end the questioning and manifested no desire to do so. Rather, she cooperated, appeared comfortable, gave express consent for Roberts to enter each room, and voluntarily retrieved the drugs from a closet. *See State v. Sherron*, 105 Ariz. 277, 279, 463 P.2d 533, 535 (1970) (finding no custodial interrogation when suspect had invited police into apartment and voluntarily cooperated with investigation).

¶12 McCarthy raises additional arguments that the trial court should have suppressed the drugs as fruit of the poisonous tree and suppressed her post-*Miranda* statements because they arguably only confirmed her answers to improper, pre-*Miranda* questioning. *See Missouri v. Seibert*, 542 U.S. 600, 611-13 (2004) (when police elicit

custodial confession before providing *Miranda* warnings, such warnings are “ineffective in preparing a suspect for successive interrogation, close in time and similar in content”). However, because we have concluded the trial court could properly have found McCarthy was not in custody and thus not entitled to *Miranda* warnings, we need not address these arguments.

Disposition

¶13 For the foregoing reasons, McCarthy’s convictions and placement on probation is affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge